U.S. Department of Justice

United States Attorney
Eastern District of New York

PSS:SPN
F.#2001V00705

271 Cadman Plaza East
Brooklyn, New York 11201

March 12, 2013

By ECF and HAND DELIVERY

The Honorable John Gleeson
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Francois Holloway v. United States
Civil Docket No. 01-1017 (JG)

Dear Judge Gleeson:

The Court has ordered the government to show cause on or before March 15, 2013 why defendant Francois Holloway's Rule 60(b) Motion seeking to void the Court's judgment denying relief under 28 U.S.C. § 2255 should not be granted. The Court has also requested "that the United States Attorney exercise her discretion to permit [the Court] to impose a more just sentence on this defendant" by agreeing to an order vacating two or more of Holloway's convictions under 18 U.S.C. § 924(c), thereby permitting the Court to impose a more just sentence.

For the reasons set forth below, the government respectfully submits that the defendant's Rule 60(b) motion is without merit and should be denied. In addition, the United States Attorney respectfully requests an additional 60 days to obtain relevant documents and make a determination whether to agree to the vacatur of any of the convictions in this case.

I. Background

The facts of this case are fully detailed in this Court's opinion in United States v. Holloway, 921 F. Supp. 155, 156-57 (E.D.N.Y. 1996), as well as in subsequent opinions by the Second Circuit and United States Supreme Court. See United States v. Arnold, 126 F.3d 82, 83-85 (2d Cir. 1997); Holloway v. United States, 526 U.S. 1, 3-4 (1999). Holloway, also known as "Abdu Ali," was convicted, following a jury trial before this

Court, of three counts of carjacking in violation of 18 U.S.C. § 2119; three counts of using a firearm in the commission of a crime of violence, in violation of 18 U.S.C. § 924(c); one count of conspiracy to operate a "chop shop," in violation of 18 U.S.C. § 371; and one count of operating a "chop shop," in violation of 18 U.S.C. § 2322, all arising from a series of carjackings that took place in Queens, New York, in 1994.

In each of the carjackings, Holloway and an armed accomplice identified a car they wanted and followed the car until it was parked. Holloway's accomplice then approached the driver, produced a gun, and threatened to shoot unless the driver handed over the keys. The accomplice testified that he would have used the gun if any of the drivers had resisted. Holloway punched one victim in the face, but there was no other actual violence. See Holloway, 526 U.S. at 4.

Holloway was sentenced to 60 months on the "chop shop" conspiracy, 151 months for operating a "chop shop" and 151 months on each of the carjacking counts, all to run concurrently; 5 years on the first 924(c) count, to run consecutively; and 20 years each on the remaining 924(c) counts, each to run consecutively. Id. At sentencing, the Court noted that the mandatory minimum sentences and mandatory stacking provisions under 18 U.S.C. § 924(c) stripped the Court of sentencing discretion. The Court described the crimes as "extremely serious" but stated that the conduct did not, in the Court's judgment, warrant the more than 57-year sentence imposed. (Sent. Tr. at 48).

Holloway appealed, primarily on the ground that the Court erroneously instructed the jury on "conditional intent." The Second Circuit affirmed the conviction and sentence, including "the imposition of consecutive sentences pursuant to 18 U.S.C. § 924(c)." Arnold, 126 F.3d at 89. The Supreme Court affirmed. See Holloway, 526 U.S. at 12.

Holloway filed a motion pursuant to 28 U.S.C. § 2255 on February 13, 2001, see Ex. A, attached, arguing, among other things, that his trial counsel was ineffective because he (1) improperly informed the government that the defense would focus on the element of intent, (2) failed to conduct adequate pretrial investigation, and (3) failed to request a "jurisdictional hearing" challenginge the government's right to prosecute the case. Ex. A, at 3-8. This Court denied the motion in a Memorandum and Order filed March 21, 2002 that examined all of Holloway's claims and concluded that they were meritless. See

Def's Ex. B. The Court denied Holloway's motion for reconsideration on June 11, 2002.

II. Holloway's Rule 60(b) Motion is Untimely and Meritless

By *pro se* motion filed on November 27, 2012, Holloway seeks an order voiding the Court's previous denial of his motion for habeas corpus relief under 28 U.S.C. § 2255. Specifically, Holloway moves pursuant to Federal Rule of Civil Procedure 60(b)(4) to re-open his 2255 proceedings on the ground that the Court failed to address his claim that he received ineffective assistance in connection with a government plea offer, rendering the Court's denial of Holloway's motion void for failure to comport with due process. See City of New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 138 (2d Cir. 2011) (observing that judgment is void under Rule 60(b)(4) if court acted in a manner inconsistent with due process of law). The argument fails for the following reasons.

First, Holloway's motion is untimely. Rule 60(c)(1) requires that motions under Rule 60(b) must be filed "within a reasonable time." Holloway filed his motion more than a decade after the challenged denial of his 2255 action and offers no explanation for the delay. If the Court had, in fact, failed to address one of Holloway's claims – a contention unsupported by the record, as discussed *infra* – Holloway could have challenged the Court's judgment immediately.[1]

Second, the alleged due process violation did not occur. The Court did not fail to address a claim that Holloway received ineffective assistance of counsel in connection with a government plea offer because Holloway made no such claim in his 2255 motion. Holloway made passing reference to counsel's advice that he not accept the government's plea offer but raised no argument that the advice was deficient. See Ex. A, at 3. In denying Holloway's 2255 motion, the Court "examined all of Holloway's claims and concluded that they are meritless." Def.'s Ex. B, at 4. Accordingly, relief under Rule 60(b)(4) is not warranted.

[1] To the extent Holloway's motion could be construed to seek relief on the ground of "mistake" or "inadvertence" under Rule 60(b)(1), it is untimely for failure to meet the more stringent time limit of one year from entry of judgment applicable to such filings. See Fed.R.Civ.P. 60(c)(1).

Third, the record provides no basis for relief under Rule 60(b)(6), a catch-all provision cited by Holloway that provides for relief from judgment for "any other reason." The Second Circuit has cautioned that Rule 60(b)(6) is properly invoked only when "extraordinary circumstances" justify relief or "when the judgment may work an extreme and undue hardship." Such circumstances are not present here.

Finally, to the extent Holloway's Rule 60(b) motion is construed to present a new challenge to his conviction under the Supreme Court's decisions in Missouri v. Frye, 132 S. Ct. 1399 (2012), and Lafler v. Cooper, 132 S. Ct. 1376 (2012), see Def.'s Mot. at 1, 4-6, the Court should deny the claim as "beyond the scope of Rule 60(b)." See Gitten v. United States, 311 F.3d 529, 534 (2d Cir. 2002). In the alternative, the Court could treat the motion as a successive petition under 28 U.S.C. § 2255 and, after providing Holloway with an opportunity to withdraw the motion, transfer it to the Second Circuit Court of Appeals for review under the gatekeeping requirements of the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2244(b)(3). See id. at 533-34.

III. The U.S. Attorney Requests Additional Time to Respond to the Court's Request Regarding the Vacatur of Convictions

The Court's February 25, 2013 Amended Order requested that the U.S. Attorney "consider exercising her discretion to agree to an order vacating two or more of Holloway's 18 U.S.C. § 924(c) convictions." The government respectfully requests an additional 60 days to obtain and review documents relevant to the Court's request and to determine its response.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: /s/
Samuel P. Nitze
Assistant U.S. Attorney
(718) 254-6465

cc: Clerk of the Court (by ECF)
Francois Holloway, Inmate # 45116-053, U.S.P.I. Coleman, P.O. Box 1033, Coleman, FL 33521 (by U.S. Mail)

EXHIBIT A

UNITED STATES OF AMERICA

V.

FRANCOIR HOLLOWAY
A.K.A. ABDU ALI

95 CR 78 (JG)
96-1563

CV 01 1017

GLEESON, J.

CHREIN

MOTION TO VACATE, SETASIDE, OR CORRECT SENTENCE:
PURSUANT TO 28USC SECTION:2255

PRELIMINARY STATEMENT

THE PETITION APPEALS FROM JUDGEMENT OF THE U.S.DISTRICT COURT FOR THE EASTERN DISTRICT OF NEWW YORK BY JUDGE GLEESON, ENTERED ON AUGUST 16,1996 CONVICTING HIM AFTER A JURY TRIAL OF CONSPIRACY TO OPERATE, MAIN-TAIN AND CONTROL A SHOP CHOP IN VIOLATION OF TITLE 18 USC SECTION 2322.AND IN VIOLATION OF TITLE 18 USC371 AND 3551 ET SEQ. COUNT ONE.

AND COUNT TWO OF THE INDICTMENT READS AS FOLLOWS: THE PETITIONER AND OTHERS KNOWINGLY AND WILLFUL LY OWN OPERATE, MAINTASNED AND CONTROL A SHOP,CHOP AND CONDUCT OPERATIONS IN A SHOP CHOP IN VIOLATION OF TITLE 18 USC SECTION 2322,2 AND 3551 ET SEQ.

PETITIONER WAS ALSO CONVICTED OF THREE COU NTS OF VIOLATING 18 USC SECTION 2119,2 AND 3551 ET SEQ. (COUNTS 7,9,and11). FURTHERMORE PETITIONER WAS CONVICTED OF VIOLATING THREE COUNTS OF 18 USC 924(C) (1) 2 AND 355 1 ET SEQ. COUNTS 8,10 and 12.

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The petitioner was sentence to 5 years on count one, 12½ years on count two as well as conts 7,9 and 11 all to be ran concurrent. As for count 8,the petitioner was sentence to 5 years, and 20 years for counts 10 and 12 all to be ran consecutively to one another as well as the previous counts.

ARGUMENTS

Petitioner request of this court to vacate set aside or correct sentence on all coubts, pursuant to title 18 USC 2255. The petitioner intends to show that he was prejudice by the prosecutor in the government's case,by being denied certain information that was ask for under 18 USC section 3500. Therefore being denied DUE PROCESS under the 5th amendment constitutional rights. The government also violated the BRADY ACT inperforming this act of refusal against the petitioner. This information was purnant to the defense of the petitioner.Also the petitioner intends to show ineffective assistance of counsel by his trial lawyer[Mr. Hanna]. Also petitioners rights under the 5th amendment were violated by the constructive amendment of his indictment without obtainer a waiver on the petitioner's part or with going back before,the grand jury.The petitioner further claims that he was prejudice by the court in it'scharge to the jury of aiding and abetting, since he wasa never charged in the indictment. The structural language of the indictment never included the wasdaided and abetted. Since he was never charged as an aider and abettor, the court

lacks jurisdiction to enter or impose a conviction or sentence for an uncharge crime. Therefore rendering the indictment defected. The petitioner further claims the court errored in stacking the 924(c)(1) counts, be ing the petitiioner was never giving the opportunity to defend himself against the second or subsequent co nviction that he never was charged with. By being su bject to TYPE OF SENTENCING UPON CONVICTION, The defe ndant was denied due process. The wording of the stau te in the 924(c) concerning second or subsequent con viction becomes another element of a different crime or an enhancement factor either way,that part of the statue has to be alledged in the indictment according to the two recent U.S. Supreme Court ruling in the ca se of U.S. v. Castillo and also in U.S. v.Jones.The language in the 924(C) statue was such a concern that in 1998 the statue was amendment into subsections and subparagraphs. The statue now reads as follow 924(c) (1)(a) or 924(c)(1)(b) and 924(c)(1)(c) and this sub section reads[in case of a second or subsequent conv iction under this section the person shall(i)be sen tence to a term of imprisonment of not less than 25 years: and it goes on to list other punishment in the same subsection.

STATEMENT OF FACTS

Petitioner was advised by counselor to with draw his agreement to plea that he was in the process of taking, the petitioner was informed by counsel that he could win the case at trial on the grounds that the government could not win it"s case if they could not meet the burden of on all the elements in the statue. He[Mr. Hanna] stated that being the petitioner never form a specific intent to kill or to cause seriously bodily harm the government could not meet the burden of proof required by law to obtain a conviction in th is particular case. The counsel for the defense then stated that he would inform the government that inten ds to seek an acquital on the grounds the petitioner nevered posse that part of the statue .By doing this he alerted the government to the strategy of the defe nse and doing so violated attorney-client relationship. [see Weatherford v. Bursey 429US 545,51L.ED 2d 30]. When the counsel for the defense made notice to the government his line of defense, he gave the government ammunition to attack the defense strategy. Because the government centered its case around the theory of con ditional intent. Therefore violating the attorney cli ent relationship, which falls under the sixth amendm ent constitutional violation. In Weatherford v. Bursey the Supreme Court enunciated the factors to determine whether there has been an invasion of attorney-client viloation; It gives four example the 4th one being

Whether the details about trail preparation were lear ned by the government. So the action of the defense counsel to forwarn the government supplied the gover nment with line of attack against the proposed defense of his client. The proof was in the government center ing its case around the conditional intent theory. Wh ich later proved to be the key in the government obt aining a conviction and the court upheld that convict ion. The defense counsel undermined his clients defenes with his indicretion. The petitioner would like to al so bring to the attention of courts, that once it was learned that the government centered its case around the conditional intent theory, the plaintiff attempt ed to assist in his defense,by making a known to the counselor an attempted carjacking that was not succes sful do the resistance of the victim. The petitioner ask his attorney to conduct a pretrial investigation in order to locate or to attempt to loacte this pote ntial witness for the defense.The testimony or the po lice report on this attempted crime would have proven to be very damaging to the governments case of condit ional intent. In this case the victim was trick to the car by Mr. Lennon on the pretense he was lost and ask ing about directions. Once the victim approached the

car he was accosted in the collar by Mr. Lennon, at which time Lennon told the ederly man to surrender his car keys or he would shoot him, but the man refuse to do so, so much so that he struggle and fought until lennon release his grip on the mans collar and the man proceeded to run away from the car. Lennon did not gi ve chase nor did he shoot or attempt to shoot this man. But Mr. Lennon testified under oath that he would have shot anyone who refused to cooperate with his demands. [see trial transcript pgs.120,121,145,150,and 150].But petitioners lawyer refuse to conduct a pretrial inves tigation.The petitioner recalls bringing this fact up in court the day he was scheduled for sentencing. I mention to the court there was a conflict of interest that existed between defendant and counsel,and that he refuse to conduct this pretrial investigation at my request. The counsels reason for the refusal was as follows:(1) The investigation would be pointless being that there was no guarantee that this person even fil ed a police report, and(2) He was a court appointed lawyer and did not have the resources to pursue this type of investigation, also his time was limited to preparaing for the trial and that he did not have the funds to hire an investigator to conduct an investiga tion. The refusal of counsel to pursue this issue was

crucially damaging to his clients defense. Being that the governments conviction was obtain on the theory of conditional intent. And the jury requested the law on intent as was explained by the court.[see T.T. pg. 430][see also the Judges prepared charge on condition al intent pgs 33 and 34]. the testimony of this witne ss would have impeached the testimony of the informant Lennon. Also the trial transcript og the court's char ge to the jury on conditional intent page 404. The te stimony of said witness was very important and should have been pursued by the defense counsel. The confron tation with this victim occured on October 19, 1994. Mr. Hanna was giving all the details of the attempted carjacking the area,the time, thetype of vehicle invo lved, which happen to be a nissan sentra. Which was the reason behind Sara Marketts attempted carjacking in the first place.For the defense counsel to refuse to honor his clients request he prejured his clients right to a fair trial.The third circuit court of app eals Judge Sloviter held that(1) defense counsel's failure to conduct a pretrial investigation was ineff ective assistance and(2) evidence at post trial hear ing established that the lack of an investigation pre jured the defendant. In Foster v. Dugger 823 F2d 402 11th cir it was said the defense attorney should, at minium,independently examine all relevant facts,cir cumstances,pleadings and laws that relate to clients case. Also in Futch v. Dugger 847F2d 1483: Defense counsel has a duty to conduct reasonable pretrial

investigation.[See criminal law key 641.13(1) Ineffe ctive assistance of counsel claims defendant need only show reasonable probability that but for counsel's un professional errors, results of proceeding would have been differently:reasonable probability is one suffic ient to undermind confidence in outcome.U.S.C.A Const. Amend.#6 Also C.L. key 641.13(6) Failure to conduct any pretrial investigation generally constitute clear instance of ineffectiveness U.S.C.A. Const. Amend 6 Counsel should have known that he could petition the court for theproper funds to conduct the investigation Also his failure to take any steps to investigate the case cannot be excused on the grounds that the invest igation would have been fruitless.[see U.S. v. Gray 878 F2d 702(3rd cir.1989).For counsel to make aclaim that a pretrial investigation would be futile and then to question the government witness concerning the cri me involving the elderly gentlemen did not coinside with his reason of not to do the investigation.[see T.T.pg 146].

Prior to trial the petitioner requested that his counsel ask the court for a jurisdictional hearing in order to compel the government to show cau se that they have the right to prosecute for the alle dge crime, when their exist a car robbery statue in the books in the state of New York. The petitioner was nevered granted this request and he nevered under stood why,

stood why, because jurisdiction is an issue that has to be resolve before any trial could take place. The petitioner kept insisting for the hearing, until he was told by his counsel that the courts opinon was the jurisdictional question was of no valure and the hearing was un warranted. But to the dissmay of the petitioner, at the end of the trial the real reason he was nevered granted the hearing came into focus. The petitioner's lawyer entered into a stipulation with the government to waive his client's right to such a hearing. The defense counsel did not have the petitioner's permission to enter into such a stip ulation nor was the defendant ever aware the stipulat ion was ever agreed upon.[seeT.T.pg.223] Until the government mention it to the court after he rested his case.[seeT.T.pg 223]. The alledge stipulation was nevered in writing according to the government.[see T.T.pg224 were in the court charged the jury with the meaning of the stipulation that was illegal]. The juris dictional challenge can never be waive by the accused, nor acqie sced by the defendant in the absence of a postitive showing upon record that jurisdiction was established.[U.S. v. Benson 495 F2d 481(1974). Mr. Hanna prejudice the petitioner rights to due proc ess from the beginning of the case to end. He also enetered into another stipulation with which unprofessional and not in the be st interest of his client, when he agreed not to do an extensive cross examination of the government witnesses. This was a very poor representation of his clients rights, especially since

he had all ready made the he would not be calling any witness, and not allow his client to take the stand in his on defense. [see T.T. pg33]. The cross examination was key in discrediting the prosecution witness, especially since there were a lot of controversey testimony and the perjury testimony by Mr. Lennon himself, which he committed in another precedure concerning th is case.[see T.T. pg. 158,and 159]. The counsel for the defense nevered challenge the presentence report on the double counting, since the petitioner was giving 2 levels for offense characteris tics[see P.S.I. pg 7 line 32] also he giving anadditional 1pt. level per carjacking totaling 3 levels plus the 2 levels and these levels totaled a 5 level increase plus another 3 level increase for the same offense [see P.S.I. pg8 lines 43-45 and 48 totaling an increase of an 8 pt.level for the same offense. My level was also increased twice under the criminal history catagory. Mr. Hanna nevered challenged these issues. Even when the court replace the defense counsel for another, after the pet itioner claim ineffective assistance, the petitioner was left in the same predicament. The court has an obligation to investigate or to grant a evidentiary hearing to settle the claim of ineffe ctiveness made by the petitioner.[see U.S. v. Gray 878 F2d 702].

Under the two prong standard set by the U S Su preme court in Strictland v. Washinton the petitioner has shown both prongs.[see also Glover v. U.S. no. 99--8576 argued Novem- ber 27, 2000 decided Jan. 9, 2001]. The U.S. Supreme court has narrowed the scope of showing prejudice in the ineffective claim.

The petitioner ask once more that his conviction b set aside or vacated and that he granted a new trial on the grou nds of ineffective assistance of counsel. The petitioner has met the burden of proof set by the Stictland v. Washington two prong test, also according to the recent decision in Glover v. U.S in- which the scope of prejudice was narrow even more.

DATED: FEB. 5,2001

Prosecutional Misconduct

The Petitioner's claims that because of the governments actions or lack of action, to produce testimonial statements by Vernon Lennon was a violation of the Jencks act and the Brady rule. Because of the governments failure,albeit in good faith to produce pretrial statements given by a key prosecution trial witness, unduly restricted the scope of cross-examination of that witness. And it is the courts duty under the Jencks act to consider results, not motive. The government violated its statutory duty, however innocently, in failing to produce statements in the possession of a government department. The only conclusion left for the court, despite the faith effort of the government to comply with the statutory mandate is that the defendant is entitled to a new trial.Being that the prosecutional key witness had purjured himself in a earlier procedure involving this case. The conviction was obtained only behind the testimony of vernon Lennon who testified at length about his intent, which he and the prosecutor claims was conditional on the behavior of the victims. Examination of the trial transcripts and the charge given to the jury on conditional intent,was enough to show that Lennon's testimony was a ample source and by itself adequate enough to support the jury's verdictbeyond reasonable doubt on all counts.[see US v. Beasley 576 F2d 626]. Especially after the court charged the jury with law of conditional intent was enough to convict on a specific intent charge. Under Jencks the prosecutor

erred in denying the petitioner request to have produce for inspection at trial and for use on cross- examination the prior statements of the government key witness,who testimony was the sole purpose behind the jury's guilty verdict. And if the petitioner's Lawyer had such informa tion and did not give it to his client on request of the prosecution, shows conspiracy for miscoduct. Wherein the government fails to disclose evidence of any understanding or request as to future prosecution of a key government witness, due process may require reversal of conviction.

Also the government has a duty to discl ose such understandings for they directly affect the cre dibility of the witness.This duty of disclosure is even more important where the witness provides the key testim ony against the accused.[see Brown v. Wainwright 785F2d 1457 11th cir.,Giglia v. US 405 US 150, 31 LED 2d 104 92 S Ct 763 and Napue v. Illinois 360 US 264 2 LED 2d 1217 79SCT 1173. In a claim of prosecutional misconduct or ne gligence, the exacting standards required are less[see U S v.Zane 50 1F2d346 2nd cir. taken from U.S. v. Khan 472 F2d 272]. The prosecutor knowingly,willingly and diliber atly use false information and testimony to enhance his case,also to pursuade the rational thinking of the jury.

In U.S. v. Booth 994 F2d 63 2nd cir.,Due process bars prosecutor from making knowing use of false evidence,and conviction may not stand if such evidence h as any reasonable likelihood of affecting judgement of jury. the prosecutor

jury. The prosecutor offered the alledged carjacking of Betty Eng and her testimony as evidence against me even though it was an uncharge crime, him knowing that it was false evidence and untrue accusations.[see trial transcripts pgs 74-75] no were in Ms. Eng's testimony did she implicate me as being present at the taking of her veichle. He also used the testimony of Lennon who said I help in the taking of said veichle,knowing it was false information.[see T.T. pg77] Mr. Garrett also stated, and I Quote: I would add one more thing to my offer of proof which is that this car, Ms. Eng's car is the subject of one of the statements that was made by Mr. Holloway, th at was one of the carjackings that he referred to in his statement.[seeT.T. pg78] This was an untrue statement and if the court examine that statement it will see that no such statement was made by the petitioner. Because the pe titioner had no knowledge of this particular crime until it was mentioned. Furthermore the crime was committed by Lennon and DAvid Ballantine,Who was charged in the indic tment for that crime,see petitioner's indictment. At best highly prejudical and irrelevant evidence was admitted; at worst, much hearsay, prosecutional witness's testimony pursuant to the carjacking of Betty Eng was admitted and attributed by the jury to the petitioner. Therefore prej udice the defendant's case. This court must view a claim of prosecutional misconduct base on statements made by the

the prosecutor. This court sholud examine the statements in comtext of the trial to determine whether they resul ted in substantial prejudice to the defendant. The prose cutor was in violation of the Brady, by not handing over such material as the grand jury moments, the grand jury charge and the testimony of the prosecutional key witness, whom had purjured himself in an earlier procedures. Under Brady defendant is entitled to disclosure of information that might be used to impeach government witness.[see U.S. v.Abadie 879F2d 1260].All testimony material in governme nts possession must be released to criminal defendant.un der the Brady rule,U.S. v. Brumel-Alvareez. The prossecu tor in his questioning of Lennon, led him to answering the question the way he wanted them answered. [see T. T. pg120] Even after the witness had already answered the same question three times, with a reply of no. This was not the answer the prosecutor wanted,so he kept leading the witness until he got the answer that satis fied him, evidently this was a pre-arranged situation.Also on pg 127 of TRIAL TRANSCRIPT PROSECUTOR again is leading t he witness to obtain the desired answer. Furthermore the prosecutor willingly knowingly and diliberately allowed pu rjury testimony to be used in the governments case again st the petitioner[see T.T. pg102].Wherein Vernon Lennon lied about the use of the black Maxim, that was taking

alledgely by the petitioner and himself on October14,1994. Butaccording to Lennon;s testimony it Was used in the ta ing of the mercury marquios on October 19,1994. Also the same maxim was used in the taking of the Mercedse Benz w hich was taking on the October 15th 1994. My question is if the Maxim(black) was taking and stripped the same day it was taking [seeT.T.pg102]then how could it be used in the taking of two other cars, especially since one of th ose cars were reported as being taking 4 days before the MAXIM WAS taking. The prosecution knew this testimony to be untrue and fail under perjury testimony, but yet he s till used it to build his case. There were decrepencies thru out the trial testimony of prosecutional key witness and this testimony was very prejudice to the defendant,a nd the prosecution had knowledge of these decrepencies,b ut he chose toignore them and used them in trial as evid ence. Either the prosecutor is illiterate, which I I know not to be true,or that he was out to literally win this case by all means neccessary, so he chose to over look t he obvious.That his case was poorly prepared. The intere st of the United States in a criminal procedure is not, itshall win a case, but that justice will be done.[Jencks v.U.S.353 US 657,LED 2d 1103 77 S CT 1007].

The Jencks act, 18USC section 3500 requ ires a court on motion of dedendant, to order the govern ment to produce any statements a government witness has made that is in its possession and relates to the subject matter of the witness's testimony.Its purpose is two fold;

(1) to allow the defendant materials for impeachment,and (20 to protect government files from unwarranted disclos ure. Failure to comply with Jencks Act may result in str iking testimony or even reversal of conviction. U.S. v. Dupuy. The prossecutors actions, so much prejudice the p etitioner rights undre the 5th amendment of the constitu tion. The petitioner seeks of this court to right a wrong that was done to ~~hk~~ him by prosecutionaj misconduct. The refore granting him due process that was denied by the in appropiate conduct of the prosesution.

CONSTRUTIVE AMENDMENT OF INDICTMENT

The petitioner ask that his conviction be setaside, vacated or corrected due to construtive amendment of his indictment. the petitioner make this claim on the fact that a indictment is defected if it fails to allege elements of scienter that are expressly contained in statue that describes offense. U.S. v. Pupo 841 F2d 1235: Hagner v.US U.S. 285 US 427, 76LED 861, 52 S.CT417. Also for an indictment to be valid, it must allege that defendant performed acts which, if proven constituted a violation of the law that he or she is charged with violating. Mc Nally v. U.S. 483 US 350, 97 LED 2d 292 107 S CT 2875, Amendment of indictment occurs when defendant is convicted of charges not included in the indictment. And is per sereversibleerror. U.S. v,Artrip 11th cir 1991,U.S. v.Pacheo 9 th cir. 1990 and U.S Leisure 844 F 2d 1347 8th cir. 1988. In 1992 the 2sd cir, ruled that constructiveamendments to indictment are generally considered prejudicial per se Thereby requiring new trial.U.S. v, BRYSER954 F2d 79. U.S. v. HuntSman 959F2d 1429 and U.S. v. Wright 932F2d 868 held 1) the 5th amendment requires that defendant be tried only on charges hand down by grandjury and thus after indictment has been returned, its charges may not be broadened through amendment except by grandjury.2) variances rises tothe level of reversible error where evidence presented at trial, together with jury instructions raises opssibility that defendant wAs convicted on offende other than charged in the indictment. And this is the basic of petitioner's claim.

In U.S. v. TRAN and SOM 234 F3d 798 2000 W.L.1701651, The 2 nd cir. court of appeals held that plain error review is inappropriate where the challenged is defect indictment is jurisdictional.Thepetiti oner's claims stems from the fact he was charged with violating 18 USC section 2119,2and 3551 ET SEQ.. As well as 18 USC section 924 (c)(1)2. But he aws convicted of aiding and betting these charges. The government presented its case against petitioner as an aider and abet tor. The judge charge the jury on aiding and abetting. The juryconvic ted on aiding and abetting. But the indictment against petitioner does not alleges that he was an aider and abettor. It reads as follows:

Count one: On or about and between October 6, 1994 and November 15,1994 both dates being approximate and inclusive,within the Eastern District of New York and elsewhere Francoir Holloway aka Abdu Ali and others did knowingly and willingly conspire to opereate maintain,and control a chop shoop,to wit: the Robinson chop shop in v iolation of 18 USC 2322. Count2: On or about and between October 6, 1994 and November 15, 1994 both dates being approximate and inclus ive, within the Eastern District of New York and elsewhere, the defen dants Teddy Arnold, Charles Robinson, DArrel Jones and Francoir Holl oway aka Abdu Ali David Valintine and others did knowingly and willfu lly own, operate,maintain, and control a chop shop and conduct operat ions in a chop shop to wit: Robinson chop shop.

Counts7,9and 11 reads: On or about Oct.Dates in the Eastern District of New York Francoir Holloway and others knowingly

and willfully take a motor vehicle to wit:((type of car) t hat had been transported,or shipped and received in inters tate commerce from persons and presence of another, by for ce, violence and imtimidation: title 18 USC section 2119 2 and 3551. Counts8,10,and 12reads: On or about dates in the EasternDistrict of New York the defendant Francoir Holloway and others knowingly, willfully and unlawfully use and car ry a firearm during and in relations to a crime of violence to wit.: the offenseschargedin counts 7,9, and 11 title 18 USC section 924(c)(1)2 and 3551 ET SEQ..

In counts 7,9, and11 the indictment should have read as follows: On or about dates in the Eastern District of New York, the defendant Francoir Holloway did knowingly willfully and unlawfully aided and abetted others with int ent to cause death or seriously bodily harm take a motor vehicle to wit: the type of vehicle(taken) that had been transported, shipped or received in interstate commerce fr om the persons and presehce of another by foree,violence a nd by imtimidation[title 18 USC section 2119 and 18 USC section 2 and3551 ET SEQ. The indictment must structured with the words aided and abetted in order to give the defe ndant proper notice of the charges he must defend against. Without the proper structure of the indictment, the defend ant can not adequately prepare a proper defaense. USCA CONST AMEND. 5 Requirement that an indictment contain all the ele ments of the offense, provides a defendant with notice and protection from double jeopardy[210k60k. Elements and indi ctments of offense in general. 210k58 Subject Matter of al legation.

When an indictment fails to allege each element of the offense, it fails to charge that offense. also the failure of an indictment to charge an offense maybe treated as jur isdictional defects, and the appellate or District court mu st notice such a flaw, even if the issue was not raised ne ither in the district court nor on appeal. [indictment and information key 196(5)]. Even if challenged after a verdict.

The failure of the indictment to allege all the essential elements of an offense is jurisdictioanl defect requireing dissmal, despite citation of the underlying statue in the indictment. This type of fundamental defect cannot be cured by absence of prejudice to the defendant or ajury instruction.[USCA CONST. AMEND.5]. There was not even the citation of 18USC section 2 located anywhere in the indict ment, and if there was,it alone is not enough to claim an aideer and abettor or substane an aider and abettor charge. See United States v. Prentiss 206 F3d 960(10th cir 2000) al so see indictment and information key 71.3

Unless the right to be charged by an indictment containing all of the material elements of an offense is voluntarily,intelligently and knowingly waive by the defen dant, the indictment as returned limits the scope of the district court's jurisdiction to the offense charged in the indictment. The petitioner was charged with violating title 18 USC sectioh 2119 2. Prosecution does not h ave jurisdiction to prosecute a defendant, and the district

court does not juriddiction to try, convict or sentence a defendant for any offense other than the one charged in t he indictment: A defendant cannot be held to answer for any offense not charged in an indictment returned by a grandjury. USCA CONST. AMEND5. Therefore the chsrgem of violating 18 USC section 2119,2 and2355 must be vacated.

The petitioner's charges of violating 18 USC925 (c)(1)2 must also be vacated being that he was nevered cha ged as an aider and abettor. The indictment should have re ad as follows: On or about October 14, 1994 in the Easterh District of New York, the defendant Francoir Holloway did knowingly, willfully and unlawfully aided and abetted others in use and carry a firearm during relations to a crime of violence, to wit: the offense charged in counts 7,9and 11. title 18 USC sectin 924(c) (1) and 18 USC sectin 2 and 3551 ET SEQ. Counts 8 and 10 must reads the same as the above pa ragraph as well as count 12. Nowhere in the indictment was the petitioner charged as an aider and abettor, but yet he was convicted as such. As written the citation in the indi ctment puts defendant on notice that he charged for violat ing the statue by use of a firearm in the commission of a crime 18 924(c)(1), also that he was carrying a firearm in the commission of a crime. 18 USC 924(c)(2). See Busic v. United States 446 US 398, 64 LED 2d 381,100 S CT 1747.

For the petitioner's conviction and sentence to coin side with charge it must read as dicussed abovve, somewhere ni the indictment it must allege that he aided and abetted others in the violation of the statues he was charge with, this the only proper way to put the petitioner on notice of the charegs against him. Without proper notice how dose the government expects the defendant to defend against the allegations brought against him, therefore how can justice be serevdd. And that is theprime objective. The petitioner was also sentence to second or subsequent convictinn on the 924(c) charges, this sentence was not in accordance with the charges of a simple 924(c) violation. Which the prescribe penalty is 5 years. The second or subsequent language cons titutes (1)an element of another crime, which must be char ged in the indictment, therefore must be presented to the jury for sentencing purpose, Castillo v.United States or(2) it simply authorizes an enchance penalty, even if used as an enchancement element it must be charged in the indictment and put before the jury. SEE Jones v. United States 526 US 227,243 n.6 119 S CT 1215,143 LED 2d 311. Where it was held that enhancement elements must be charged in an indictment, so whether the government argues that its an element of an other crime orwhether its an element to enhance the penalty of a statue,it dose not matter, according to both Supreme Court it must be alleged in the indictment. Also in Apprendi.

Therefore the two twenty year sentence the petitioner received for the second or subsequent conviction cannot stand and must be vacated and resentence for just a simple 924(c) violation. There was no waiver by the defe ndantof hism indictment to be charged and tried and convict ed upon charegs other than what was in the indictment. In US v. Ferguson 785F2d 843, 850-851 the 2nd circuit court of appeals held: the waiver must be made in open court, defendant must be informed of the nature of and the cause for the accusation, and the court must be satisfied that the defendant waived his rights knowingly,intelligently and vo luntarily. The record does not and will not show that defe ndant committed such an act.

In USv. Prentiss the 10th cir. held: the failure of the indictment to allege a federal crime cannot be cured by proof at trial bh any means. Fuethermore in US v. Spinner(3rd cir.) US v. Cabrera-Teran 5th cir. has held the claim, the government maynot constitutionally prosecute the charge of an enhance firearm offence, because it was nevered charge in the indictment. As for being convicted as aiderand abettor in violation of 18 USC 924(C)(1) it mu st be vacated on hhe grounds: in order to substane a convict ion, it must be shown that the defgendant furthered the cr ime by his actions. Mere knowledge of the crime, or even dri ving a person to the scene of a crime is not enough to su bstane a conviction,aiding and abetting of a 924(c)(1) vio lation, the person would have to get out the car and

accompany the person who committed the crime in order to s ubstane this type of charge.[see Bazemore v.US ca 11(Ga.) 1998,138 F3d 947]. Apprendi v. New Jersey, the SUpreme Cou rt has said that any fact that increases the prescribed st atutory maximum penalty to which a criminal defendant is ex posed must be submitted to a jury and proven beyond reason able doubt.Also in Jones v. US 526 US at 251-52 the court obseved any fact other tham prior convictions that increase the maximum penalty for a crime must be charged in an indictment submitted to a jury and proven beyond a reasonable doubt. SEE also US v. Nordby opinion of judge Canby and US v. POw ell 109 F.supp 2d 381. Lower courts are obligated to follow both narrow holding announced by Supreme Court, as well as the rule applied by the court in reaching its holding.For the reasons stated previously the court must hold the 924 (c)(1) charges in the indictment, limitted the scope of the district court's jurisdiction to accepting a guilty verdict and entering a conviction and sentencing only for the sim ple firearms offense thats charged in the indictment. Thus the petitioner's 924(c) convictions are deem convictions for the simple firearms offense,and must be remanded for re sentence. In US v. Som and Tran the 2nd circuit court of appeals held: remand for ressentencing was not required when district court exceeded it's jurisdiction and sentence def endant for enhanced firearm offense not charged in the ind ictment, Although conviction would be deem to be for simple firearm offense which was charged in the indictment. The 2nd cir. court of appeals previously determine that 924(c) firearms statue was ambiguous as to theappropriate unit of

prosecution [see US v. Lindsay(1993),US v.Coiro (1991).

This court acted without subject matter jurisdiction, therefore must notice and correct the error. The trial court must adhere to decisions of higher court, even when it disagree or find error in it. U.S v. Jacob 955 F2d 2nd circuit 1992. Only the Supreme Court can abrog ate one of its earlier rulings. Finally the petitioner ask the court toremand and resentence for the reason of the new amendment from the sentencing guide line commission which became on Novembere 1, 2000, ~~xxxxx~~ Wherein they revised the 924(c) statue saying that you can no longer stack the gun counts if they all fall under the same predicit act. My 924 (c) counts was under the conspiracy inwhich I was charged with in my indictment. Also, the petitioner was sentence, as an aider and abetter to the charged crime, being that the informant was only sentence to one charge of 18 USC~~xxx~~ 2119 and one charge of 18USC 924(c), the defendant should have only been enhanced on the other two counts of carjacking a ~~dd~~ firearms violations. The petitioner only seeks justice that was denied him at trial.